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Recognition of business and economic interests of media in defamation and privacy law

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'We value the freedom of the press but the press is a commercial enterprise and can flourish only by selling newspapers'[†]

This article explores, with particular reference to the law in the United Kingdom and New Zealand, features of the dignity torts, defamation and privacy, which have the potential to recognise and thereby protect the business and economic interests of media. It traverses the development of public interest defences in both torts and examines how the courts carry out the balancing process involved in determining the validity of pleaded public interest defences. In privacy claims, the determination of whether the claimant had a reasonable expectation of privacy impacts greatly on how media may go about the business of newsgathering and publishing. The developing remedial principles in privacy law are also discussed. Finally in defamation, the developing threshold requirement for a plaintiff to show some form of serious harm from published speech is analysed to determine whether it reduces the outlay for media conglomerates from the risk-fraught but central enterprise of publication. Although there appears to be no overt principle governing when business and economic interests are protected within defamation and privacy law, nonetheless, elements of recognition of the need for protection can be detected within these torts.

I Introduction

Currently a powerful commercial imperative to maintain effective profi models exists for media businesses in a context of ongoing massive disruption to media markets, caused by new technologies allowing the flo of information across multiple media platforms. This has prompted migration of audiences and advertising away from mainstream media, resulting in increasing reductions in profit This 'problem' is generally referred to as the phenomenon of convergence. Media businesses are in transition and seeking new profi models. In this context, laws which affect the business and economic interests of media have profound impact.

This article explores features of the dignity torts, defamation and privacy, which have potential to protect the business and economic interests of media and media companies. In order to do this, it focusses on what is often referred to as 'the commercial imperative' — or the drive to make a profit as the particular business and economic interest involved. The commercial imperative operates powerfully on the media to obtain and publish

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† Lord Hoffman in the leading UK privacy case, *Campbell v MGN Ltd* [2004] 2 AC 457; 62 IPR 231; [2004] 2 All ER 995; [2004] UKHL 22 at [77].

information which will sell to the widest possible audience. By 'media' is meant mainstream media (sometimes also called 'old' or 'legacy' media), referring to traditional forms of mass communication, such as newspapers, television, and radio (together with their various internet manifestations) regarded collectively.[1]

In common law jurisdictions, the ancient tort of defamation has, for centuries, provided some protection for reputation for determined plaintiffs, while remaining a constant irritation for media because claims to prevent publication or seek compensation for publication obviously increase business risk for media businesses. Much more recently, partly in response, it has been suggested, to convergence, the burgeoning judge-made torts of privacy have made their appearance, thus increasing the extent of media business risk. Common law jurisdictions, and particularly those with legislative or constitutional protection of human or civil rights, now variously recognise a tort which remedies breach of privacy caused by publication of private information, and sometimes also, something akin to a tort of intrusion into seclusion.[2]

The possibility of a claim associated with publication or newsgathering is undoubtedly a risk that has attached to being in the media business for a very long time, a risk that is recognised by the existence of various specialised forms of insurance. A realised risk brings cost, and the cost of defending a claim made under what are seen as restrictive plaintiff-friendly laws is the most obvious of these, followed by damages and the costs of the plaintiff's legal team if the defence is unsuccessful. However, there may be additional costs arising from the general chilling effects said to result from a successful claim, whereby certain stories are lost or cease to be published or pursued, at least for a time, or risk-averse procedures dominate, at least for a while. Of course, from a plaintiff and plaintiff-lawyer perspective, these costs are regarded as entirely appropriate and desirable. However, for media they are real and to be resisted, and often fall harder on smaller businesses. Therefore any development or application of the law which appears to reduce this business risk is welcomed by media.

Both the defamation and privacy torts are about protection from harms arising from published speech or a desire to publish speech. The law of defamation protects the respect and esteem in which a person is held because that is the essence of reputation. New Zealand, for example, applies established English case law definition such as: 'a statement that might tend to lower the plaintiff in the estimation of right-thinking members of society generally';[3] and 'a false statement about a man to his discredit'.[4] Although somewhat old-fashioned, these definition speak strongly to loss of dignity and autonomy, with an emphasis on the falsity of the information.

In privacy, it has been recognised from the outset that the action is also

1 *Oxford Dictionaries*, Oxford University Press, at <http://www.oxforddictionaries.com/> (accessed 14 November 2016).

2 See, eg, *Google Inc v Vidal-Hall* [2016] 2 All ER 337; [2015] 3 WLR 409; [2015] EWCA Civ 311; *Hosking v Runting* [2005] 1 NZLR 1; [2004] BCL 395; BC200460235 (*Hosking*); *C v Holland* [2012] 3 NZLR 672; [2012] NZHC 2155.

3 *Sim v Stretch* [1936] 2 All ER 1237 at 1240 per Lord Atkin.

4 *Youssoupoff v MGM Pictures Ltd* (1934) 50 TLR 581 at 584 per Scrutton LJ.

about protecting dignity and autonomy — in *Campbell v MGN Ltd*[5] Lord Hope stated that the new form of privacy protection the House of Lords recognised in that case was about: 'the protection of human autonomy and dignity — the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people'.[6] In *Hosking v Runting*, the leading NZ case, Tipping J in the majority said:

> It is of the essence of the dignity and personal autonomy and wellbeing of all human beings that some aspects of their lives should be able to remain private if they so wish.[7]

In both defamation and privacy actions, then, plaintiffs assert autonomy over the use (and sometimes the collection) of information about them, either true or false. This assertion clashes directly with the business and economic interest of media — the commercial imperative — described above. Therefore any features of the torts which allow the balancing, reduction or defeat of assertions of plaintiff informational autonomy are of great value to media. These may be direct benefit but are more likely to be indirect.

In this article I attempt to examine selected features of the torts which appear to have this potential. The article therefore traverses the development of public interest defences in both torts and in particular, how public interest has been define and applied in ways that can take account of the commercial imperative. The general question asked is to what extent judicial interpretation of what it is media corporates should validly make a profi out of features in the treatment of the public interest defences.

I go on to examine the tort of privacy, where the determination of what a reasonable expectation of privacy is in each case impacts greatly on how media may go about the business of newsgathering and publishing. I also investigate developing remedial principles in privacy law to determine how chilling these laws will be on media businesses.

Finally, in defamation, I examine a developing threshold requirement for a plaintiff to show some form of serious harm from published speech when making a claim. Requirements which make it harder for plaintiffs to sue can obviously mitigate damage to the business and economic interests of media.

I conclude that although there appears to be no overt principle governing when business and economic interests are protected within defamation and privacy law, nonetheless, elements of recognition of the need for protection can be detected within these torts, and other elements provide useful protections by a side wind.

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5 [2004] 2 AC 457; 62 IPR 231; [2004] 2 All ER 995; [2004] UKHL 22 at [51]. See also U Cheer, 'Divining the Dignity Torts — A Possible Future for Defamation and Privacy' in *Comparative Defamation and Privacy*, A T Kenyon (Ed), Cambridge University Press, 2016, p 318.

6 As identifie and endorsed by N Moreham in 'The Protection of Privacy in English Common Law: A doctrinal and theoretical analysis' (2005) *LQR* 121 at 628–56. See also the theorists noted by Moreham in her n 34.

7 *Hosking* [2005] 1 NZLR 1; [2004] BCL 395; BC200460235 at [239]. See also McGrath J in *Brooker v Police* [2007] 3 NZLR 91; [2007] NZSC 30; BC200760845 at [225].

II Public interest defences in defamation and privacy

Public interest defences have great value to media in terms of being able to perform their prime functions and manage business risk. It is interesting to note that this defence attached to the older tort of defamation only quite recently, but the privacy torts came with the defence attached from their inception. The problem of definin and delimiting the defence is common to both torts, however. Further, defamation public interest defences are qualifie by conditions of responsibility as to the truth which, if imposed with a heavy hand, could detract from the obvious value of these defences.[8]

A public interest defence allows a defendant to argue that publication of the impugned material should be allowed because the public has a 'right to know' the information, or a genuine interest of some kind in it. Considerable judicial and other ink has been spilled trying to defin what the public interest means.[9] One favoured formulation is based on the idea that the information is of 'legitimate public concern'.[10] This approach is an attempt to emphasise that public interest topics are not simply those that the public is interested in. The word 'concern' suggests the information must be of *importance* to the public, rather than one which they simply have a 'low' curiosity to read.[11] The latter interpretation would allow the media almost unlimited scope to protect its business and economic interests. This approach is taken in the United States, where in the law of privacy, the defence of public interest has been equated with the term 'newsworthy' and 'To a very great extent the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definitio of news'.[12] Thus a very powerful public interest defence exists in that jurisdiction, no doubt influence in large part by the supremacy of freedom of expression within the American constitution. While media in the United Kingdom, Australia and New Zealand would no doubt prefer such an approach, it is not one that prevails and instead, a balancing approach is favoured where many elements are weighed to determine whether the defence is successful, including freedom of expression.

Although it adds come clarity to the issue of what is in the public interest, the legitimate public concern approach still begs the question of what can legitimately be published, and arguably more specifi approaches may be helpful. A survey of recent developments in defamation law is of some interest. New Zealand defamation law provides a form of qualifie protection[13] to statements published generally which directly concern the functioning of representative and responsible government. In particular, this covers statements made about the public responsibilities of past, present or

8 This is not relevant to privacy cases, which are usually based on publication of true information.

9 See, eg, Joint Committee on Privacy and Injunctions, *Privacy and Injunctions*, HL Paper 273/HC 1443, House of Lords and House of Commons, 27 March 2012, at [47]–[50].

10 For example, the leading NZ privacy cases, *Hosking* [2005] 1 NZLR 1; [2004] BCL 395; BC200460235 at [267]; *C v Holland* [2012] 3 NZLR 672; [2012] NZHC 2155 at [96].

11 See in particular *Hosking*, ibid, at [113] per Gault P and Blanchard J.

12 W P Keeton, *Prosser and Keeton on Torts*, 5th ed, West Group, pp 860–2.

13 The defence is lost if there is ill will, or recklessness or a cavalier approach to the truth: s 19 Defamation Act 1992 (NZ).

future politicians.[14] This defence now appears to be developing into a full public interest defence in New Zealand, in that our lower courts at least are consistently suggesting that it is not confine to discussion about elected politicians and could cover discussion of the quality of a consumer product relevant to a large portion of the population, for example.[15]

The United Kingdom has enacted a statutory formulation which provides that it is a defence to a defamation action to show that the statement complained of was on a matter of public interest and the defendant reasonably believed that publishing the statement was in the public interest.[16] 'Public interest' is not define and previous case law is relevant. The test there, it has been said, is what it was in the public interest that the public should know, and what the publication could properly consider that it was under a public duty to tell the public.[17]

Australia has a constitution-based defence of qualifie privilege protecting a reasonable publication of a communication about government and political matters that is interpreted quite broadly as to subject matter,[18] and Canada has 'responsible communication on matters of public interest',[19] which is not confine to discussion of government or political matters. There the subject matter must invite public attention or substantially concern the public because it affects the welfare of citizens or attracts considerable public notoriety or controversy. Some segment of the public must have a genuine stake in knowing about the matter. This element is not characterised narrowly.[20]

The clearer a definitio of public interest is, the more accessible and useful it is to media wishing to avoid or reduce publication risks. A useful definitio is one suggested some years ago by New Zealand's Broadcasting Standards Authority, a statutory body responsible for the regulation of television and radio. In the context of a complaint about a breach of privacy, the BSA suggested that an issue of public interest would have to be of concern to, or have the potential to affect, a significan section of the NZ population and that matters of public interest will include:

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14 *Lange v Atkinson* [1997] 2 NZLR 22; *Lange v Atkinson* [1998] 3 NZLR 424; (1998) 4 HRNZ 683; *Lange v Atkinson* [2000] 1 NZLR 257; [2000] 2 LRC 802; (1999) 5 HRNZ 208; *Lange v Atkinson* [2000] 3 NZLR 385.

15 See U Cheer 'The burgeoning of freedom of expression in New Zealand defamation law' in *Media Freedom and Regulation in the New Media World*, A Koltay (Ed), Wolters Kluwer, 2014, pp 273–87.

16 Defamation Act 2013 (UK) s 4(1).

17 *Al-fagih v HH Saudi Research and Marketing (UK) Ltd* [2001] All ER (D) 48 (Nov); [2002] EMLR 215; [2001] EWCA Civ 1634; *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] 4 All ER 913; [2012] 2 WLR 760; [2012] UKSC 11.

18 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520; 145 ALR 96; BC9702860. See the High Court's earlier judgments in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; 34 ALD 1; 124 ALR 1; BC9404647 and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; 124 ALR 80; BC9404651, and *Watt v Herald & Weekly Times Ltd* [1998] 3 VR 740; (1997) A Def R 52-085; BC9702673; *Harkianakis v Skalkos* (1999) 47 NSWLR 302; 150 FLR 330; [1999] NSWSC 505; BC9907110; *O'Shane v John Fairfax Publications Pty Ltd* (2004) Aust Torts Reports 81-733; [2004] NSWSC 140; BC200401049; cf *Aktas v Westpac Banking Corporation* (2010) 241 CLR 79; 268 ALR 409; [2010] HCA 25; BC201005389 and *Madafferi v Age Co Ltd* [2015] VSC 687; BC201512087.

19 *Grant v Torstar Corp* 2009 SCC 61; [2009] 3 SCR 640 at [7], [65].

20 Ibid, at [96]–[97].

- criminal matters, including exposing or detecting crime;
- issues of public health or safety;
- matters of politics, government, or public administration;
- matters relating to the conduct of organisations which impact on the public;
- exposing misleading claims made by individuals or organisations;
- exposing seriously anti-social and harmful conduct.[21]

The development and continued refinemen of these defences have increased protection for the business and economic interests of media by creating more certainty about what stories can be published. For example, my own discussions with media and media lawyers in New Zealand have revealed that our political discussion defamation defence is being used as a public interest defence to resist claims and prevent them reaching court, even though there has been no decision from our higher courts affirming the extension of the defence as yet.

However, because most of these public interest defences allow or require the behaviour of the publisher in obtaining and publishing the story to be examined by the court, there is the risk that if applied in a heavy-handed way, the value of such defences to media could be greatly reduced. In the United Kingdom, for example, courts began to apply a series of checks developed as guidelines to appropriate media responsibility instead as a set of mandated threshold requirements which would give access to the public interest defence.[22] This difficulty for media was ameliorated by the Defamation Act 2013 (UK), which now requires that the court has regard to all the circumstances of the case when determining the public interest question, and in particular, when deciding whether it was reasonable for the defendant to believe that publishing the statement was in the public interest, must make such allowance for editorial judgement.[23] Here we have a rare example of explicit statutory recognition of media business and economic interests in defamation law, effectively a direction to judges not to tell editors how to do their job.

Media business and economic interests have also been recognised explicitly in *case law* dealing with public interest defences. A good example is a NZ privacy case called *Andrews v Television New Zealand.*[24] The Andrews' claim for damages arose because they were filme by a production company for a series commissioned by Television New Zealand (TVNZ) while being rescued by firefighte following an accident in their vehicle. The accident occurred when the plaintiffs were returning from a party at which they had both been drinking. When tested later, both were found to be over the legal blood alcohol limit. The rescue operation was a complex one because the plaintiffs were trapped and had to be removed using 'jaws of life'. They were unaware they

21 *Balfour v Television New Zealand Ltd* BSA 2005–129. See also the hierarchy of speech suggested by Lady Hale in *Campbell v MGN Ltd* [2004] 2 AC 457; 62 IPR 231; [2004] 2 All ER 995; [2004] UKHL 22 at [148].

22 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127; [1999] 4 All ER 609; [1999] 3 WLR 1010; *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359; [2006] 4 All ER 1279; [2006] 3 WLR 642; [2006] UKHL 44.

23 Defamation Act 2013 (UK) s 4(2) and (4).

24 [2009] 1 NZLR 220 (*Andrews*).

were being filme and were also unaware edited footage of the incident would be used about a year later in an episode of a reality television series 'Fire Fighter', which was broadcast by TVNZ. The programme focused on the activities of the firefighter but also showed the plaintiffs interacting with their rescuers. Although some pixelation was used, parts of the plaintiffs' faces were shown, and intimate statements of endearment made by Mrs Andrews to her husband were broadcast. Undoubtedly the work of the fir service (the subject of the documentary) could have been shown without using the Andrews' conversation. However, the court recognised the realities of modern media and accepted that audience do not engage with material unless it is interesting. Allan J said:

> In assessing an asserted defence of legitimate public concern the court will ordinarily permit a degree of journalistic latitude so as to avoid robbing a story of its attendant detail which adds colour and conviction.[25]

In another privacy case, William Young P in the Court of Appeal said:

> I agree that the underlying issues can be debated without the videotape being shown on national television but experience shows that arguments are usually more easily understood when they are contextualised. An esoteric argument . . . becomes far more accessible to the public if the implications can be assessed by reference to the concrete facts of a particular case.[26]

In the House of Lords case *Campbell v MGN Ltd* Lord Nicholls expressed a similar view. He said that non-publication of peripheral information can sometimes rob a story 'of colour', and that 'the balance ought not to be held at a point which would preclude . . . a degree of journalistic latitude'.[27]

Andrews illustrates just how much judgment and balancing is involved in assessing the defence and how this can be done in a way that is generous to media. Although it was unnecessary to the judgment in *Andrews*, Allan J stated he would have upheld a defence of legitimate public concern. This was because he thought the reality programme had a serious underlying purpose as well as a certain level of entertainment.[28] It was about firefighte as rescue teams and the public had an interest in the cost of road accidents and the functioning of those teams.[29] The judge indicated he would have given a degree of latitude to the makers of the programme to allow them to report on the work of the firefighter so he thought it did not matter that the tale could have been told without identifying the plaintiffs.

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25 Ibid, at [82].

26 *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 156 at [128]. This dictum was approved by Blanchard J in the Supreme Court: *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277; [2007] NZSC 91; BC200762862 at [55].

27 *Campbell v MGN Ltd* [2004] 2 AC 457; 62 IPR 231; [2004] 2 All ER 995; [2004] UKHL 22 at [28], and see also at [62], [65] per Lord Hoffman, at [107]–[108] per Lord Hope, at [169] per Lord Carswell. See also *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] 4 All ER 913; [2012] 2 WLR 760; [2012] UKSC 11 at [132]–[137], and *Re Guardian News and Media Ltd* [2010] 2 AC 697; [2010] 2 All ER 799; [2010] 2 WLR 325; [2010] UKSC 1 at [63].

28 *Andrews* [2009] 1 NZLR 220 at [91].

29 Ibid, at [92].

III Reasonable expectation of privacy

In the common law jurisdictions discussed, media rely on and benefi from a general rule that if something happens in a public place it will usually not be categorised as private. This will self-evidently be so if the person pictured in a public place is not the focus of the photograph, but just 'happens to be there'. But even where the person is the focus, the law accepts there is usually nothing private about how a person looks in public.[30] Furthermore, generally speaking, there is no law against spying on, or taking photographs of, a person's property from any place outside it: from an upstairs window of adjoining premises, through a fence, from an aeroplane, or from the footpath.[31] As far as aircraft are concerned, aviation statutes usually provide that no action for trespass lies in respect of aircraft flyin over property at a reasonable height.[32] In an English case,[33] a fir of aerial photographers took an aerial photograph of Lord Bernstein's country house in Kent. Lord Bernstein took strong exception, and sued for trespass and invasion of privacy. His claim failed. The court held that an owner has rights to the airspace above his or her land only to such height as is necessary for the ordinary enjoyment of that land, and that an aircraft flyin above that height thus commits no trespass.[34] Further, it was held that there was no law against taking photographs in these circumstances. And in an Australian case, a man

30 In *Campbell v MGN Ltd* [2004] 2 AC 457; 62 IPR 231; [2004] 2 All ER 995; [2004] UKHL 22 at [154] Baroness Hale said:

> If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it.

31 *Television New Zealand Ltd v K W* HC Auckland, Courtney J, CIV-2007–485–001609, 18 December 2008, unreported, at [62]–[63]. Compare *Raciti v Hughes* (1995) 7 BPR 97,601; BC9501706 where Young J agreed that in the normal course of the law, photographing a person was not actionable. However, he was prepared to accept that there were some limits to the freedom to photograph, and, on analogy with cases dealing with telephone harassment, was prepared to fin the use of video equipment to be sufficiently close to watching and besetting to constitute an actionable nuisance.

32 For example, Civil Aviation Act 1990 (NZ) s 97(2). These rules are being tested by burgeoning drone usage, which has prompted increased regulation, motived firs by safety concerns but also to a certain extent, by privacy concerns: see, eg, D Goldberg, M Corcoran and R G Picard, *Remotely Piloted Aircraft Systems & Journalism: Opportunities and Challenges of Drones in News Gathering*, Reuters Institute for the Study of Journalism, University of Oxford, June 2013.

33 *Lord Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479; [1977] 2 All ER 902. Further clear authority is found in *Bathurst City Council v Saban* (1985) 2 NSWLR 704, where a photograph was taken (without trespassing) of the plaintiff's backyard and certain goods were stored there. It was held no wrong had been committed.

34 However, Lord Griffith did go on to say in *Lord Bernstein of Leigh v Skyviews & General Ltd*, ibid, at QB 489; All ER 909: 'But if the circumstances were such that a plaintiff was subjected to the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity, I am far from saying that the court would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would give relief'. See also *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 493; 1A IPR 308 at 309; BC3700015 (*Victoria Park*).

who built a high platform on premises next door to a racecourse and watched the races and broadcast commentaries on them was held by the High Court to have committed no wrong by so doing.[35]

The leading NZ publication privacy case, *Hosking*,[36] upheld this general rule. Mike Hosking, a television presenter, and his wife had separated. A photographer took photographs of Mrs Hosking walking down a public street with the Hoskings' twin baby daughters in a pushchair. The Hoskings sued for an injunction to stop publication of these photographs in a magazine. They relied on invasion of privacy. Although by a majority the Court of Appeal recognised the existence of a tort of privacy, it unanimously agreed that the Hoskings failed on the facts. The photographs were taken in a public place; they created no risk to the children; they disclosed no further facts about the children, nor about the family circumstances, that were not already in the public domain; and no reasonable person could treat publication of them as highly offensive or objectionable.

Other NZ examples are *A v Wilson & Horton Ltd*[37] where a police officer who had shot a man in a public street was refused suppression of his identity. One of his grounds for seeking it was privacy, but the court noted that what was involved was 'a public act in a public place by a public officer'. And more recently in *Faesenkloet v Jenkin,*[38] where the plaintiff objected to the operation of a camera installed on the roof of a garage adjacent to a driveway running to his property, the High Court held that the claim failed because there could be no reasonable expectation of privacy given the public ownership and use of the driveway. Media newsgathering activities would be severely hampered if this basic legal rule did not exist. The rule is a strong example of one which protects media business and economic interests. However, it is not unlimited.

Tort law now recognises, though rarely, that the fact that an event takes place in public does not always determine whether media are entitled to report on it. This means some events occurring in a public place can still attract an 'expectation of privacy'. Thus, an exception to the general rule described above is when a vulnerable person is involved such that it would be repugnant to publish. Examples recognised in various jurisdictions are where a

35 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*, ibid. The case was applied in *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414; 56 ALR 193; 3 IPR 545; BC8400490. However, in *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; 185 ALR 1; [2001] HCA 63; BC200107043, the High Court of Australia noted that *Victoria Park* would not necessarily prevent the development of a tort of privacy in that jurisdiction: see, eg, Kirby J at [185]–[187]. No tort has yet developed, however.

36 [2005] 1 NZLR 1; [2004] BCL 395; BC200460235; noted by R Tobin, 'Yes, Virginia, there is a Santa Claus: the tort of invasion of privacy in New Zealand' (2004) 12 *TLJ* 95; K Evans, 'Was Privacy the Winner on the Day?' [2004] *NZLJ* 181; P Sumpter and H Graham, '*Hosking v Runting*: New Zealand's new privacy tort' (2004) *NZIPJ* 290. For discussions of *Hosking* and its aftermath, see J Burrows, 'Media Law Symposium: Invasion of Privacy — *Hosking* and Beyond' [2006] *NZ Law Review* 389; U Cheer, 'The Future of Privacy: Recent Developments in New Zealand' (2007) 13 *Cant LR* 169.

37 [2000] NZAR 428.

38 *Faesenkloet v Jenkin* [2014] NZHC 1637; BC201462813.

photograph was taken of a person severely injured in a car accident,[39] or of a woman with the wind blowing her skirts up,[40] or CCTV footage of a man who had attempted suicide by cutting his wrists in the street.[41] In the English case of *Campbell v MGN Ltd*[42] the plaintiff succeeded when (among other things) she was pictured on the footpath outside a drug rehabilitation clinic. The NZ case of *Andrews*[43] referred to above is also an interesting illustration. In that case it was held by Allan J that although everything had taken place in public, the couple, who were accident victims, and therefore vulnerable, nonetheless had a reasonable expectation of privacy in the contents of their conversation.

Children are beginning to be treated as within the vulnerable exception category, or at least as entitled to special consideration in their own right. In New Zealand, two senior judges Gault P and Blanchard J pointed out in *Hosking* that, 'the special position of children must not be lost sight of'.[44] As Tugendhat J said in *Spelman v Express Newspapers*:

> Children enjoy no general right to privacy simply by reason of their age. But the law has always recognised that in particular circumstances children may be entitled to protection from publicity where an adult would not be.[45]

An strong example is *Weller v Associated Newspapers Ltd*[46] which arose from photographs taken without consent by a paparazzi photographer in LA, California, of the musician Paul Weller and his three children out on a mundane family occasion, shopping and having coffee. The photographs were purchased by *Associated Newspapers Ltd* and published by the *Mail Online,* together with an article and captions misidentifying Weller's 16-year-old daughter as his wife and the mother of his twin boys in the photo who were aged 10 months. The successful claim was made by Weller on behalf of the children, and the fact that Weller and his wife had spoken about the children in interviews and some photos had been posted on Twitter did not prevent a reasonable expectation from arising. Although the court recognised parents can give away the privacy of their children, this requires more than simply responding to questions about family life, which Weller had done in interviews as a normal parent. Additionally, neither parent had ever allowed

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39 Example given by Young J in *Bathurst City Council v Saban* (1985) 2 NSWLR 704 at 707–8.

40 *Daily Times Democrat v Graham* (1964) 162 So 2d 474. This example was also given by Young J in *Bathurst City Council v Saban*, ibid.

41 *Peck v United Kingdom* [2003] All ER (D) 255 (Jan); [2003] EMLR 287.

42 [2004] 2 AC 457; 62 IPR 231; [2004] 2 All ER 995; [2004] UKHL 22.

43 [2009] 1 NZLR 220.

44 *Hosking* [2005] 1 NZLR 1; [2004] BCL 395; BC200460235 at [123], although the Hosking children did not receive special treatment in that case. In *Television New Zealand Ltd v Solicitor-General* (2008) 28 FRNZ 108; [2008] NZFLR 706; [2008] NZCA 519 at [85] Baragwanath J spoke of 'the weight placed by law and society on the need for protection of the human dignity of those who are not of an age to exercise personal autonomy and handle the asperities of adult life . . . our legal history shows that children's privacy rights are not to be compared with those of adults'. Compare *Murray v Express Newspapers Plc* [2009] Ch 481; [2008] 3 WLR 1360; [2008] 2 Fam Law R 599; [2008] EWCA Civ 446.

45 *Spelman v Express Newspapers* [2012] EWHC 355 (QB) at [53]. See also *AAA v Associated Newspapers Ltd* [2012] EWHC 2103 (QB); [2013] EWCA Civ 554, and *Weller v Associated Newspapers Ltd* [2014] All ER (D) 142 (Apr); [2014] EWHC 1163 (QB).

46 [2015] All ER (D) 194 (Nov); [2016] 3 All ER 357; [2016] 1 WLR 1541; [2015] EWCA Civ 1176.

photographs of their children's faces to be published. Because of these developing exceptions, media business and economic interests have less protection in relation to the activities of children and other vulnerable parties which take place in public.

However, one aspect of the reasonable expectation element in privacy law which favours media business and economic interests is the accepted view that celebrities and public figure have less expectation of privacy than other people.[47] Reporting on the goings on of celebrities is big business for many media entities. The expectation of privacy will be correspondingly reduced as the person's public profil increases. But the degree of that reduction of expectation may differ according to whether the person has willingly put himself or herself in the spotlight, or whether he or she is a 'reluctant debutante' who has had publicity thrust on him or her.[48] A number of UK cases have taken the view that 'if you have courted public attention then you have less ground to object to the intrusion which follows'.[49] Likewise, those with important public roles which raise expectations of them as role models, may expect more discussion of their conduct. Thus it was said of an England football captain that there was a justifie public interest in reporting his off-fiel behaviour and discussing his suitability for such an important role in representing his country.[50] A NZ court has found that the principal of a high-profil school could have no reasonable expectation of privacy in relation to an allegation that his past conduct was the subject of a police investigation.[51]

Even the most well-known celebrity, however, is entitled to some degree of privacy: everyone has the right to control publicity about intimate personal matters which are no one's business but their own.[52] It is more difficult with families of public figures The American authorities, cited in the judgments in *Hosking*, suggest that even they have a lesser expectation of privacy than other people: the glory reflecte from their parents cannot but affect their lives. In fact, the behaviour of parents can unfortunately reduce a child's reasonable expectation of privacy in the sense that the child's privacy can be 'given

47 *Hosking* [2005] 1 NZLR 1; [2004] BCL 395; BC200460235 at [122].

48 'Reluctant debutante' is the expression used by McGechan J in *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 at 735.

49 *A v B Plc* [2003] QB 195; [2002] 2 All ER 545; [2002] 3 WLR 542; [2002] EWCA Civ 337 at [11] per Lord Woolf CJ. See also *Woodward v Hutchins* [1977] 2 All ER 751; [1977] 1 WLR 760; *Theakston v MGN Ltd* [2002] All ER (D) 182 (Feb); [2002] EMLR 22; [2002] EWHC 137 (QB) and *McClaren v News Group Newspapers Ltd* [2012] EMLR 33; [2012] EWHC 2466 (QB).

50 *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB). See also *Trimingham v Associated Newspapers Ltd* [2012] 4 All ER 717; [2012] EWHC 1296 (QB) at [93] where Tugendhat J said: 'There is no dispute that the status of the claimant, that is whether the claimant is a private individual . . . or a public figur . . . is also relevant when considering the right of freedom of expression'. See also *McClaren v News Group Newspapers Ltd*, ibid.

51 *Clague v APN News and Media Ltd* [2013] NZAR 99; [2012] NZHC 2898.

52 *A v B Plc* [2003] QB 195; [2002] 2 All ER 545; [2002] 3 WLR 542; [2002] EWCA Civ 337 at [11] per Lord Woolf CJ, cited by Gault P and Blanchard J in *Hosking* [2005] 1 NZLR 1; [2004] BCL 395; BC200460235 at [121]. The House of Lords expressly recognised this in *Campbell v MGN Ltd* [2004] 2 AC 457; 62 IPR 231; [2004] 2 All ER 995; [2004] UKHL 22. See also *McKennitt v Ash* [2008] QB 73; [2007] 3 WLR 194; [2007] EMLR 113; [2006] EWCA Civ 1714 at [55] per Buxton LJ.

away'. The child in *AAA v Associated Newspapers Ltd*[53] was less than a year old, and the claim was for misuse of private information arising from the publication of articles and a photo over a period of some months speculating about whether the paternity of the child was a well-known politician. Publication of the articles was found not to be a misuse of private information. The child did have a reasonable expectation of privacy, but this was compromised and reduced by the behaviour of the mother because she had been indiscreet, telling others at a house party about the paternity issues although her claim stated she wanted to control when the child should fin out about her paternity.

IV Recent development of remedial principles in privacy law

A Damages

The *Gulati v MGN Ltd* case[54] shocked media in the United Kingdom because the court made a series of much higher damages awards than had ever been made before against media. Damages awarded in this case ranged from £72,500 to £260,280. Prior to this, the highest award of damages was £60,000 to Max Mosley in *Mosley v News Group Newspapers Ltd*.[55] However, it is important to note the awards made against Mirror Group Newspapers in *Gulati* were for the worst sorts of privacy breaches which also involved criminal activity. The case involved the determination of damages after the *Mirror* finall admitted sustained and consistent phone hacking in particular, over many years, used against celebrities, public figure and indeed, some 'ordinary' people. It shows that in the matter of determining what losses will be compensated for in privacy cases, media have not been able to persuade the courts to recognise their business and economic interests with great success.

In *Gulati*, the Mirror suggested that where privacy is breached, damages should cover only distress and injury to feelings. But the numerous claimants argued there should be compensation for loss of autonomy, for injury to feelings and for damage to dignity. The judge, Mr Justice Mann, decided these claims are indeed about more than distress and injury to feelings. He thought that there is a right to privacy and damages should reflec the fact that the right itself has been infringed and autonomy has been taken. He said:

> While the law is used to awarding damages for injured feelings, there is no reason in principle, in my view, why it should not also make an award to reflec infringements of the right itself, if the situation warrants it.

Neither did the court accept that it is too difficult to measure what loss of things like autonomy are worth. He went on to say:

> The fact that the loss is not scientificall calculable is no more a bar to recovering damages for 'loss of personal autonomy' or damage to standing than it is to damages for distress. If one has lost 'the right to control the dissemination of information

53 [2012] EWHC 2103 (QB); [2013] EWCA Civ 554.
54 [2015] EWHC 1482 (Ch) (*Gulati*).
55 [2008] EWHC 687 (QB).

about one's private life' then I fail to see why that, of itself, should not attract a degree of compensation, in an appropriate case.[56]

When working out the amounts to be awarded for publication in each claim, the judge bore in mind the circulation and readership figure of the newspapers, which were substantial. In this calculation, media business and economic interests could be said to have been used against them. For example, daily circulation figure for the *Daily Mirror* were just over 2 million in 2003, falling to 1.5 million in 2008. However, readership generally was accepted to be much more than that — argued as 2.5 times that, making it over 4 million in every year except 2008. Generally then, there was a considerable readership for the articles in question, and all the articles were made available online.

Additionally, the court stated a number of principles impacting on how media can protect their businesses:

- Certain types of information are likely to be more significan than others. Medical information is more likely to be private, so its interception and disclosure is likely to attract a higher figure This will cover matters of mental health as well as physical health. However, not all medical-related disclosures will be treated the same — this will depend on the nature of the information.
- Significan private financia matters also attract a higher degree of privacy, and therefore compensation.
- But information about a social meeting which is used to get a photograph is likely to attract a lower degree of privacy in terms of compensation, but can be magnifie by other factors, such as contributing to a feeling of harassment.
- Information about matters internal to a relationship will be treated as private. Compensation levels will depend on the nature of the information listened to and disclosed, the amount of distress and upset caused and the effect on the relationship. Information which damages the relationship, or which is likely to impede attempts by the couple to repair the relationship if that is what they are trying to do, will likely be treated as a serious infringement and result in substantial compensation.
- The Egg-shell skull rule applies. This means a thinner-skinned individual may be caused more upset, and therefore receive more compensation, than a thicker-skinned individual who is the subject of the same intrusion.[57]

B Injunctions

PJS v Newsgroup Newspapers Ltd,[58] a recent prominent privacy case from the United Kingdom deserves attention because in it, in spite of concerted media resistance, the courts severely reduced legal protection for the publication of kiss and tell stories, a significan source of media profit particularly for tabloid media. In the case, an injunction was granted to the plaintiff by the High Court to prevent the publication of the fact that he had been involved in

56 *Gulati* [2015] EWHC 1482 (Ch) at [111].
57 Ibid, at [229].
58 [2016] EWCA Civ 393 (*PJS*).

extramarital affairs, including a private tryst with two others. It was granted, in particular, to protect the children of the couple from harassment by media if the name was allowed to be disclosed. The initial injunction was lifted by the Court of Appeal, but that decision was appealed to the Supreme Court, which upheld the injunction in a powerful judgment even though the name of the applicant had been leaked or sold into other jurisdictions, published by media in the United States and Scotland and had also appeared on the internet.

First, the court made it very clear that so-called 'kiss and tell' stories are very low-value speech — they are forms of commercial speech, since they are really intended to sell more media output. Although it was emphasised media have a right to report the behaviour of well-known figure in order to criticise them, for there to be any public interest in kiss and tell stories, the stories must contribute to a debate of general public interest in a democratic society, otherwise the protection of the right to freedom of expression will count for little. Kiss and tell stories have therefore been confirme as being at the bottom end of the spectrum of importance in terms of speech and will weigh little when balanced against privacy rights.

Second, the court rejected the view that injunctions are useless in privacy law in the internet age. It said injunctions can still be of practical use to stop a media storm breaking on the family, particularly the children, if disclosure was allowed.[59] The court also made a statement which could be seen as strongly unsympathetic to media business and economic interests:

> It is one thing for what should be private information to be unlawfully disseminated: it is quite another for that information to be recorded in eye-catching headlines and sensational terms in a national newspaper . . .

It is interesting to contemplate what the fallout from *PJS* will be. A narrow interpretation of the decision would suggest the Supreme Court merely crafted a special role for injunctions to play within privacy law — that of preventing harassment which might flo from publication. I think it did more than that, however, and a more broad interpretation is the right one. At the very least, *PJS* made clear low-level speech will not weigh highly against privacy interests or, alternatively, that the public interest in low level speech like kiss and tell stories has to be very high to trump the privacy interest. However, it can be argued something more fundamental than remedial change took place, and that the case made clear that the UK privacy tort itself protects not only against publication of information, but also against forms of harassment and intrusion, which it has not clearly done in the past. This will impact directly on the ability of media to engage in newsgathering. Finally, it is possible the case and the behaviour of the media in relation to it will encourage more applications for so-called super injunctions in the future because claimants will be more motivated to seek orders which cannot be reported at all and will be able to use evidence of the blatant attempts of media to undermine the *PJS* privacy injunction to argue that a super injunction would be a good idea. In this, then, media behaviour might be seen as having undermined its own business and economic interests in the long run.

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59 Ibid, at [64]–[65].

V A serious harm threshold in defamation

The fina area I address which may provide possible protection for business and economic interests of media in defamation and privacy is the development of processes which allow the weeding out 'undeserving claims' as early as possible in order to avoid the expense of long drawn out claims. All jurisdictions have preliminary processes which allow forms of strike out, and applications for security as to costs or to halt vexatious litigants. However, a recent development in UK defamation law is of interest. Following a number of court decisions,[60] the UK Defamation Act 2013 now contains a qualificatio or threshold of seriousness, so as to exclude trivial claims.[61] Section 1 of the Act provides:

> (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
>
> (2) For the purposes of this section harm to the reputation of a body that trades for profi is not 'serious harm' unless it has caused or is likely to cause the body serious financia loss.[62]

This provision will be of some value to media defendants depending on how rigorously and efficiently it is applied. The firs decision applying the provision clarifie that evidence will not be required in every case to satisfy the serious harm test.[63] This is because some statements are so obviously likely to cause serious harm to a person's reputation that an inference can arise. The example given in the case was if a national newspaper with a large circulation wrongly accuses someone of being a terrorist or a paedophile. The court considered that in such a case the likelihood of serious harm to reputation would be plain. Thus, the more serious the allegation made by media, the easier it may be for a claimant to satisfy the requirement.

For less obvious allegations, claimants will be put to the expense of obtaining evidence by commissioning material such as opinion poll surveys, or producing comments from blogs, and may fin it harder to pass through the threshold. However, depending on the evidence put forward, and the other circumstances taken into account, it may in fact be possible for the threshold to be satisfie even though a claimant in fact did well after the impugned publication. An example is *Theedom v Nourish Training*,[64] where serious allegations were published by email to over 100 actual and potential

60 The leading case being *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946; [2005] 2 WLR 1614; [2005] EMLR 353; [2005] EWCA Civ 75 at [55].

61 It is interesting to note that UK courts also hold that trivial infringements are not within the compass of privacy law: it has been said that the invasion must be 'of some seriousness': *M v Secretary of State for Work and Pensions* [2006] 2 AC 91; [2006] 4 All ER 929; [2006] 2 WLR 637; [2006] UKHL 11 at [83], cited in *McKennitt v Ash* [2008] QB 73; [2007] 3 WLR 194; [2007] EMLR 113; [2006] EWCA Civ 1714 at [12].

62 Section 1(2) is duplicated in New Zealand's Defamation Act 1992 s 6, a requirement that has existed in the law for many decades.

63 *Cooke v MGN Ltd* [2015] 2 All ER 622; [2015] 1 WLR 895; [2014] EWHC 2831 (QB); *Lachaux v Independent Print Ltd* [2016] QB 402; [2016] 2 WLR 437; [2015] EWHC 2242 (QB) and *Theedom v Nourish Training* [2015] EWHC 3769 (QB); and *Sobrinho v Impresa Publishing SA* [2016] EWHC 66 (QB). See also A Mullis and A Scott, 'Tilting at Windmills: The Defamation Act 2013', (2014) 77 *MLR* 87 at 87–109.

64 *Theedom v Nourish Training*, ibid.

customers of the defendant. The claimant provided some evidence of responses to the emails, however the court found this did not add or detract much from inferences which would normally be drawn from publications of this kind. The emails had been sent by an influentia and apparently reliable author to a fairly substantial audience that was potentially important to the claimant's career and no steps had been taken to withdraw or apologise for the contents of the email. The serious harm requirement was met.

As regards the threshold requirement for business claimants to show serious financia loss or likely serious financia loss, it appears the courts are using a practical approach to whether this has been met. This means most business claimants have to put forward evidence of some kind or other, although how this is treated will, as with the requirement for individual claimants, be crucial.[65]

The fina point to make is one about the risks associated with attempting to shortcut potentially long proceedings by requiring a party to establish or meet a new requirement. Such constraints inevitably create new issues over which the parties will battle, thus adding to the complexity and cost rather than simplifying processes. The UK threshold cases decided so far suggest that to determine whether the requirements as to serious harm are met, the sorts of things the courts will look at are the nature and seriousness of the words used, how far and wide the publication has gone and to what sort of audience, whether an apology has been published, whether a reliable source has been used, and for online publication, how long the words have been online and how many hits have resulted.[66]

Carrying out such a detailed assessment could result in mini-trials which will make preliminary hearings more complex rather than less, and undermine part of the purpose of the reform.[67] A practical and fair approach should be used to combat this.

VI Conclusion

This article has traversed a number of issues to test which facets of the defamation and privacy torts might provide recognition and protection for media business and economic interests. It is rare that these torts directly and favourably address the fact that the media are commercial enterprises which, although they perform a crucial function as the fourth estate of maintaining and enhancing democratic states and the rights of citizens within them, would cease to exist if they could not sell copy.

By examining the development of public interest defences within the torts,

65 *Undre v London Borough of Harrow* [2016] EWHC 931 (QB). In New Zealand, it does not appear too difficult for a business to prove likely pecuniary loss under s 6 of the Defamation Act 1992. See, eg, *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488 at 497; 19 IPR 482 at 491.

66 See *Cooke v MGN Ltd* [2015] 2 All ER 622; [2015] 1 WLR 895; [2014] EWHC 2831 (QB); *Lachaux v Independent Print Ltd* [2016] QB 402; [2016] 2 WLR 437; [2015] EWHC 2242 (QB); *Sobrinho v Impresa Publishing SA* [2016] EWHC 66 (QB).

67 This is of some interest in New Zealand, where at least one court has approved the UK requirement for a serious harm threshold for individual claims in recent obiter statements: *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854; BC201562452 at [171]–[182].

it is apparent that the development and continued refinemen of these defences have increased recognition for the business and economic interests of media by creating more certainty about what stories can be published. However, because most of these public interest defences allow or require the behaviour of the publisher in obtaining and publishing the story to be examined by courts, it is clear the defences should be applied broadly and courts should attempt to avoid telling editors how to do their job.

In privacy law, the general rule that activities in public can be reported on or photographed favours media business and economic interests. It is important that the developing exceptions to this rule which mark the activities of vulnerable people and children are carefully applied and delimited. Aspects of the law which favour media in this respect are that celebrities and public figure have less expectation of privacy than other people as may those who are treated as role models, and that parents can in some cases be found to have given away the privacy of their children.

Remedial developments in privacy law do not appear to favour media business and economic interests, in that privacy awards have increased while such awards have also been held to cover more than distress and injury to feelings, and now clearly cover damage to dignity and autonomy as well. Injunctions have been held to have valid functions in spite of the escape of injuncted information onto the internet and applications for super-injunctions may increase in the future. The death knell may have sounded for high-profi kiss and tell stories. One possible business and economic advantage from these developments may be, however, that otherwise uncertain areas of remedial law have now been clarified making it easier for media to adjust commercial behaviour and reduce risk.

Finally, in defamation law, the development of serious harm thresholds suggests possible increased protection from the reduction of costs and time spent by media defending undeserving actions. However, it remains unclear as yet how effective such reforms will be.